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Supreme Court of the United States

October Term, 1950

No. 228

ARROW AIRWAYS, INC., ET AL.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

Supreme Court of the United States

October Term, 1950

No.

ARROW AIRWAYS, INC.; CENTRAL AIR TRANSPORT, INC.; FEDERATED AIRLINES, INC.; GREAT LAKES AIRLINES, INC.; MODERN AIR TRANSPORT, INC.; PENINSULA AIR TRASPORT, INC.; and TRANS AMERICAN AIRWAYS, INC.

v.

CIVIL AERONAUTICS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable Fred Vinson, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on June 5, 1950. (R. 55)

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth on page 54 of the Record.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 5, 1950. (R. 55) The jurisdiction of this Court is invoked under 28 USC 1254(a).

QUESTIONS PRESENTED

The questions herein presented may be stated to be:

1. May the United States Court of Appeals for the District of Columbia Circuit deny jurisdiction to review an order of the Civil Aeronautics Board adopting amendments to its economic regulations?

2. May the United States Court of Appeals for the District of Columbia Circuit deny jurisdiction to review an order of the Civil Aeronautics Board adopting amendments to its economic regulations:

(a) when petitioners allege such order was issued in violation of the due process clause of the Constitution of the United States and the procedural requirements of the Administrative Procedure Act?

(b) when petitioners allege such order was issued in an attempt to regulate a segment of the air transportation industry over which Congress had declined to grant to the Civil Aeronautics Board authority to regulate?

STATUTES AND REGULATIONS INVOLVED

The pertinent section of the statute involved is set out full in the margin.[1]

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[1] 49 USCA § 646. *Judicial review.*

(a) Any order, affirmative or negative, issued by the Board under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 601 of this chapter, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board by the clerk of the court; and the Board shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

(d) Upon transmittal of the petition to the Board, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided,* That no interlocutory relief may be granted except upon at least five days' notice to the Board.

(e) The findings of facts by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 346 and 347 of Title 28. June 23, 1938, c. 601, § 1006, 52 Stat. 1024; Reorg. Plan No. IV, § 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235.

SUMMARY STATEMENT OF MATTER INVOLVED

On April 13, 1949, the Civil Aeronautics Board issued Draft Release No. 38 which purported to give notice of a rule making proceeding leading to the amendment of its Economic Regulations.

With no other notice, and without any hearing, on November 4, 1949, the Civil Aeronautics Board ordered the adoption of Amendment No. 1 to Part 242 and Amendment No. 2 to Part 291, Economic Regulations, Civil Aeronautics Board.

On December 31, 1949, petitioners filed with the United States Court of Appeals for the District of Columbia Circuit a petition for review of the order of the Civil Aeronautics Board and alleged:

(a) That the notice given by Draft Release No. 38 failed to meet the rule making requirements of the Administrative Procedure Act because its issuance was so timed and its purpose so camouflaged by misstatements and omissions that it misdescribed the subjects and issues involved and mislead the entire air transportation industry.

(b) That the amended economic regulations control the relationships and activities of ticket brokers over whom the Board has no statutory jurisdiction; and

(c) That since the amended economic regulations limit the license of the large irregular carriers, both the defective notice given by Draft Release No. 38 and the absence of any hearing violate the due process clause of the Constitution and the adjudication requirements of the Administrative Procedure Act.

On June 5, 1950, the United States Court of Appeals for the District of Columbia Circuit handed down its opinion and denied its jurisdiction to consider the petition.

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SPECIFICATION OF THE ERROR TO BE URGED

The United States Court of Appeals for the District of Columbia Circuit erred in denying jurisdiction to review the order of the Civil Aeronautics Board amending its economic regulations.

THE REASON FOR GRANTING THE WRIT

The United States Court of Appeals for the District of Columbia Circuit has decided a question of general importance and substance relating to the construction of a statute of the United States which question has not been, but should be, settled by this Honorable Court.

ARGUMENT AND BRIEF

The questions presented involve the interpretation of the Civil Aeronautics Act of 1938.[1] But, more than this, they involve a basic, fundamental determination as to the limit and extent of the jurisdiction of United States circuit courts of appeals and of the ability of such courts to review the actions of administrative agencies in issuing rules and regulations.

Further, there is presented the question of whether an interpretation of the limits of jurisdiction of the circuit courts of appeals in relation to one administrative agency shall equally apply to all administrative agencies notwithstanding differences between the statutes creating the administrative agencies and defining the jurisdiction of the

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[1] 49 USCA § 401, 646.

circuit courts to review the actions of such administrative agencies.[2]

Even assuming the premise that administrative agencies when acting in a rule making capacity and when issuing a rule prospective in nature should be free of judicial review, it is not believed that this premise should apply where the basis for the request for judicial review is that such action of the administrative agency in issuing the rules and regulations was in violation of the due process clause of the Constiution and in violation of the procedural requirements of the Administrative Procedure Act. When these allegations, or either of them are sustainable, then, clearly the action of the administrative agency was an illegal action and should be set aside after judicial review.

Congress in enacting the Civil Aeronautics Act specifically provided for review of orders of the Civil Aeronautics Board by the circuit courts of appeals and enumerated by name the United States Court of Appeals for the District of Columbia Circuit.[3]

It would be impossible for Congress to more clearly state a delegation of jurisdiction to review actions of the Civil Aeronautics Board than it has done in the Civil Aeronautics Act.

It is believed that Congress has exactly and specifically delegated to the United States Court of Appeals for the District of Columbia Circuit jurisdiction to review "all" orders of the Civil Aeronautics Board including orders amending its economic regulations. This having been done, such United States Court of Appeals may not deny its

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[2] In its opinion the United States Court of Appeals referred petitioners to its opinion in *United Gas Pipe Line* case, which case interpreted the Federal Power Act.

[3] 49 USCA § 646 (a) and (b).

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jurisdiction and must review the action of the Civil Aeronautics Board.

The final determination of this question is of tremendous importance to the air transportation industry. The Civil Aeronautics Board has embarked on a course of action which indicates a determination to revoke the licenses of all large irregular carriers. The Board undoubtedly has such power but it may not indiscriminately and illegally exercise it. The Board has attempted to accomplish its purpose by action purporting to be an exercise of its rule making power without granting any of the carriers a hearing, and without making necessary findings.

The carriers believing that their statutory and constitutional rights are infringed have indicated a determination to resist what appears to be an unlawful attack upon them.

Certainly, there is some court to which they can apply for a determination. However, if they are compelled to exhaust the possibilities by the trial and error method [4] it will leave the industry in an unsettled condition for many months. If the Board has been acting properly within its authority, the public interest will suffer while lawyers argue and courts deliberate over who has jurisdiction to determine the issue on its merits.

The question involves the jurisdiction of the Court of Appeals to review similar orders of other administrative agencies as well, and while of immediate and prime im-

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[4] On December 9, 1949, action was commenced in the District Court for the Southern District of New York. When the Civil Aeronautics Board contended that such District Court was without jurisdiction and to save time petitioners dismissed that action and filed their petition in the United States Court of Appeals for the District of Columbia Circuit.

portance at this time is its application to orders of the Civil Aeronautics Board, the determination of the instant matter will have general applicability in administrative law.

CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issue under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia Circuit commanding said Court to certify and send to this Honorable Court a full and complete transcript of the record and of the proceedings had in this case numbered and entitled on its Docket, No. 10495, *Arrow Airways, Inc., et al., Petitioners,* v. *Civil Aeronautics Board, Respondent,* to the end that this cause may be reviewed and determined by this Honorable Court as provided for by the Statutes of the United States; and for such other and further relief as to this Honorable Court may seem proper and just.

Dated: July 27, 1950

/s/ DAYTON M. HARRINGTON,
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